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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

ANTHONY L. GRECO,

Plaintiff and Appellant,

v.

JOHN M. ROBERTSON,

Defendant and Respondent.

B214994

(Los Angeles County  
Super. Ct. No. SC096343)

APPEAL from a judgment of the Superior Court of Los Angeles County.  
Joseph S. Biderman, Judge. Affirmed.

Law Offices of Mark West and Mark West for Plaintiff and Appellant.

Bonne, Bridges, Mueller, O’Keefe & Nicholas, David J. O’Keefe and  
Vangi M. Johnson for Defendant and Respondent.

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## ***INTRODUCTION***

Appellant, Anthony L. Greco (“Greco”) appeals from a judgment following the sustaining of a demurrer to his second amended complaint without leave to amend on grounds his causes of action were barred by the one year statute of limitation set forth in Code of Civil Procedure section 340.5.<sup>1</sup> For the reasons hereafter stated, the judgment is affirmed.

## ***FACTUAL AND PROCEDURAL SYNOPSIS***

On September 9, 2004, Greco underwent heart bypass surgery performed by Dr. John M. Robertson (Robertson) at St. John’s Health Center. Immediately following surgery, Greco purportedly suffered excruciating pain, developed an infection, felt there was something wrong, and consulted healthcare providers at UCLA Medical Center. The consultants were unassociated with Robertson. In December of 2004, Greco underwent a second surgery, this time at UCLA, to repair a misaligned sternum.

*Greco’s original complaint filed on December 7, 2007.*

On December 7, 2007, Greco filed his original complaint alleging medical malpractice against Robertson. Greco filed a “form” complaint and in the “description of reasons for liability” for negligence in the first cause of action alleged as follows:

“Defentant [sic] Doctor, Hospital and their agents were grossly negligent in the performance of their contracted duties in the care and treatment of the plaintiff for cardiac surgery such that permanent physical & emotional damage resulted. These acts of medical malpractice and negligence caused collaterally substantial additional medical and consequential expenses and loss.”

In Greco’s second cause of action for breach of contract, he alleged as follows in substantiating his cause of action for breach of contract:

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<sup>1</sup> All future statutory references are to the Code of Civil Procedure unless otherwise stated.

“Defendants were bound & agreed that in payment for their services they would render the highest quality of medical care in the persuit [sic] of plaintiff’s cardiac surjury [sic] (before/during and after)[.] In the most critical areas of the agreement they failed in thier [sic] contractual obligations resulting in extreme physical damage etc.”

In Greco’s third cause of action for fraud (intentional or negligent misrepresentation), he alleged as follows:

“Before, during, and after major heart surjury [sic] defendants assured plaintiff the best medical care and induced him to travel from Hawaii as such. After surjury [sic] various serious symptoms of extreme pain were dismissed by defendants as normal. Plaintiff was constantly reassured that nothing was amiss for more that 3 months while he deteriorated and inspite of plaintiffs knowlege [sic] that symptoms and diagnostic [sic] evidence indicated otherwise. These false representations made to plaintiff were willful self serving and ultimately resulted in severe damage & near death. [¶] These representations were in fact false. The truth was as follows:

“The truth was that the defendants & their agent knew that the complex of symptoms experienced by defendant [plaintiff] and the diagnostic results of xrays indicated a failed thoraic [sic] union of the sterum [sic] and rib cage and a mismatch of same and that immediate corrective surjury [sic] was called for to remove the risk of infection and the high levels of pain.”

The copy of the complaint included in the record on appeal does not contain a verification.

*Greco’s first amended complaint for damages for medical malpractice and fraud filed on July 3, 2008.*

Robertson did not file a response to the original complaint of Greco in that Greco filed his first amended complaint prior to the time Robertson’s response was due.

Greco’s first amended complaint differs in many respects from his original filing on December 7, 2007, the more noteworthy of which is the first amended complaint is prepared by an attorney. The charging allegations have been amended to allege as follows:

“The events giving rise to this cause of action began on or about September 9, 2004 during an open heart bypass surgery performed by defendants and their employees and agents and the mistreatment and knowing concealment of the medical condition caused by defendants which concealment continued to and including on or about May 8, 2005. Plaintiff, based on his trust in defendants in addition to being on pain killers and other medications, was in no condition to know of defendant’s mistreatment of him and only through the efforts of others was he sent to another medical care facility to obtain proper care and treatment which saved his life. Plaintiff continued to need 24 hour home nursing care and did not know of any of the mistreatment he received at the hands of defendant. Plaintiff, as diagnosed by a psychiatrist on or about August 2, 2007 suffered from a type of memory impairment because of the condition caused by defendants and each of them and therefore did not know what had happened to him and could not have, with reasonable diligence, discovered the medical malpractice occasioned upon him by defendants and each of them.”

*Robertson’s demurrer to appellant’s first amended complaint filed July 31, 2008.*

On July 31, 2008, Robertson filed his demurrer to Greco’s first amended complaint, contending the pleading was deficient in that:

The first cause of action for negligence (medical malpractice) was time barred in accordance with the statute of limitations set forth in section 340.5;

The first cause of action was factually deficient and it was uncertain;

The second cause of action for fraud by intentional concealment was time barred pursuant to section 338 and was also factually deficient and uncertain; and

The third cause of action for “intentional infliction [sic] of emotional distress” is time barred by the statute of limitations pursuant to section 335.1 and was also insufficient and uncertain.

The demurrer was supported by a memorandum of points and authorities and the declaration of Lauren A. Randolph and exhibits filed with the demurrer.

*Holding of the trial court on Robertson's demurrer to the first amended complaint.*

Following the filing of opposition to the demurrer by Greco on September 2, 2008, and Robertson's reply thereto on September 11, 2008, the trial court conducted a hearing on the demurrer on September 23, 2008, and sustained the demurrer on all grounds but with 15 days leave to amend.

*Second amended complaint for medical malpractice and fraud filed by Greco on October 7, 2008.*

Greco filed his second amended complaint on October 7, 2008. For purposes of this appeal the operative complaint is the second amended complaint and will be referred to hereafter as "SAC".<sup>2</sup> Greco alleged in his first cause of action that defendants committed medical malpractice by rendering negligent treatment engaging in the following acts and omissions:

"A. Caring for, handling and managing THIS PATIENT and THIS PATIENT'S medical care.

"B. Managing, maintaining, operating, supervising, selecting and controlling the medical care providers and facilities and its staff and equipment.

"C. Providing medical care and attendant care to THIS PATIENT.

"D. Failing to inform, explain, warn, guard and protect THIS PATIENT of and against the dangers, hazards, risks and complications of the various medical procedures and care and treatment to be performed.

"E. Withheld from THIS PATIENT facts and information necessary to enable THIS PATIENT to form an intelligent, free, real and informed consent to the procedures, care [sic] and treatment, of which facts and information THIS PATIENT was unaware.

"F. Failing to refer THIS PATIENT to an appropriate medical specialist, and failing to obtain appropriate medical consultation for THIS PATIENT.

"G. Failing to provide proper and timely aid and assistance to THIS PATIENT.

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<sup>2</sup> The SAC also included defendant St. John's Health Center, but this defendant was later dismissed.

“H. Conducted themselves with reference to THIS PATIENT so as to cause, permit and allow THIS PATIENT to suffer damages as hereafter alleged.”

Greco's second cause of action was alleged as fraud by intentional concealment. The allegations of the second cause of action are summarized as follows: immediately after surgery Greco suffered extraordinary pain in his chest and complained to defendants about it; defendants knew of the actual cause of the pain; defendants concealed the cause of the pain which was misalignment of Greco's ribs and sternum and represented that there was nothing to be concerned about and was to be expected after surgery; the concealment continued to about May 8, 2005, when Greco was visited by Dr. Wu at St John's Medical Center who continued to conceal and deny he or anyone at St. John's knew that something was wrong or that Greco's care fell below the standard of practice; despite knowledge of the cause of Greco's pain and his need for further surgery, defendants refused to act; defendants had a fiduciary position with Greco but breached that duty in failing to disclose the true cause of his pain; Greco was passed between doctors and departments and his condition continued to worsen and through the efforts of others Greco ultimately received the proper medical treatment; as a result of his ordeal, Greco has suffered memory impairment; and the actions of defendants was willful, malicious, fraudulent and taken with a conscious disregard for the safety and rights of Greco.

*Robertson's demurrer to the SAC filed on November 6, 2008.*

On November 6, 2008, Robertson filed his demurrer to the SAC stating two grounds as follows:

The first cause of action for negligence (medical malpractice) is time barred by both the one-year and three-year provisions of section 340.5; and

The second cause of action for fraud by intentional concealment is time barred by the statute of limitations pursuant to section 338 and the cause of action is factually insufficient under section 430.10, subdivisions (e) and (f).

Greco filed opposition to the demurrer on December 1, 2008. Robertson filed a reply to the opposition on December 3, 2008.

*Hearing on demurrer to the SAC.*

On December 2, 2009, the trial court conducted a hearing on Robertson's demurrer to the SAC. The matter was taken under submission and thereafter the trial court sustained the demurrer and entered a judgment of dismissal, disposing of the matters at issue in the case. Thereafter Greco filed a timely notice of appeal.

***DISCUSSION***

*Standard of review.*

There is no dispute as to the standard of review on appeal following the sustaining of a demurrer without leave to amend. The question is whether the trial court abused its discretion in not allowing an additional opportunity to file an amended pleading. Reversal lies only where it is determined there is a reasonable possibility the complaint can be cured by amendment, otherwise the judgment of the trial court will be affirmed for lack of abuse. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) Appellant has the burden of demonstrating abuse of discretion by showing how the complaint can be amended to state a cause of action. (*J.B. Aguerre, Inc. v. American Guar. & Liab. Ins. Co.* (1997) 59 Cal.App.4th 6, 18.)

With this standard of review in mind, we now examine whether there is reasonable possibility that Greco can state a cause of action if given an opportunity to file a third amended complaint. We hold that no such possibility is apparent and affirm for the reasons hereafter set forth.

Initially it should be noted that Greco concedes in his opening brief that his cause of action for medical malpractice is barred by section 340.5. The singular issue before this court is whether Greco's cause of action for fraud is also barred, and if so, whether the trial court's sustaining of the demurrer to the SAC is appropriate by virtue of the fact that no leave to amend was granted. We find the ruling of the trial court to be error free.

*Ruling of the trial court.*

The trial court stated that "According to plaintiff's Complaint, after Defendant Robertson performed surgery on 9/9/04, Plaintiff immediately suffered severe pain and at

least one staph infection. Within that three-month period, Plaintiff underwent corrective surgery at UCLA. Plaintiff does not give a definite date regarding the surgery but based on these allegations, the surgery occurred at the very latest in December 2004.

“Plaintiff alleges that the UCLA surgery was required to ‘repair the misaligned sternum and ribs resultant from the negligence occurred during the first surgery.’ . . . The only legitimate inference to be drawn from Plaintiff’s allegations is that he discovered, or through the use of reasonable diligence should have discovered, the injury at issue by December 2004, when he was forced to undergo surgery to repair what was done in the first surgery performed by Robertson. Based on CCP 340.5, any action for medical malpractice had to be brought by December 2005.”

Second, the trial court found that Greco cannot circumvent the statute of limitations set forth in section 340.5 by alleging fraud. The trial court stated:

“Plaintiff’s medical malpractice and fraud by intentional concealment actions are based on the same nucleus of facts and Defendant’s treatment of Plaintiff. Plaintiff’s action is essentially one for personal injury and as noted by the court in *Tell v. Taylor* (1961) 191 Cal.App.2d 266, 271 ‘appellant had cited no authority in this state or elsewhere to indicate that it is possible to extend the statute of limitations in a personal injury action bringing it on a theory of fraud. Rather, even though the plaintiff alleges false representations on the part of the physician or fraudulent concealment, our courts have always treated the action as one for malpractice.’ See also *Garlock v. Cole* (1962) 199 Cal.App.2d 11, 15. While limited exceptions to the general rule in *Tell* have been articulated, none of those exceptions apply here. See e. g. *Nelson v. Gaunt* (1981) 125 Cal.App.3d 623, 632. [Fn. omitted.]”

We think that the first cause of action is barred by section 340.5 and the issue appears to be conceded. We hold that the *Tell* decision has been accurately analyzed and cited by Robertson and lays to rest any claim of recovery based on fraudulent concealment and the judgment of the trial court should and is hereby affirmed.



***DISPOSITION***

The judgment is affirmed. Respondent is awarded costs of appeal.

**WOODS, J.**

**We concur**

**PERLUSS, P. J.**

**JACKSON, J.**